

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

OK 16/10/78
77-4198

To be argued by
Stanley Israel

United States Court of Appeals

For the Second Circuit.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

SHOPMEN'S LOCAL UNION NO. 455, INTERNATIONAL ASSO-
CIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL
IRON WORKERS, AFL-CIO,

Intervenor,

against

INDEPENDENT ASSOCIATION OF STEEL FABRICATORS, INC.;
ACHILLES CONSTRUCTION CO., INC.; GREENPOINT ORNA-
MENTAL AND STRUCTURAL IRON WORKS, INC.; HEU-
SER IRON WORKS, INC.; IKENSON IRON WORKS, INC.;
KUNO STEEL PRODUCTS CORP.; MASTER IRON CRAFT
CORP.; MELTO METAL PRODUCTS CO., INC.; MOHAWK
STEEL FABRICATORS, INC.; THE PEELE COMPANY; ROMAN
IRON WORKS, INC.; SPIGNER AND SONS STRUCTURAL
STEEL CO., INC.; S. CERVENKA AND SONS, INC.; PAXTON
METALCRAFT CORP., DIVISION OF APEX INDUSTRIES,
INC.; KOENIG IRON WORKS, INC.; TROJAN STEEL CORP.; G.
ZAFFINO AND SONS, INC.; ROMA IRON WORKS, INC., and
SHIPMEN'S LOCAL UNION NO. 455, INTERNATIONAL ASSO-
CIATION OF BRIDGE STRUCTURAL AND ORNAMENTAL
IRON WORKERS, AFL-CIO,

Respondents,

and

LOCAL 810, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF
AMERICA, AFL-CIO,

Intervenor.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD.

**Brief for Respondents with the exception of Heuser
Iron Works, Inc., Spigner and Sons Structural Steel
Co., Inc., and Shipmen's Local Union No. 455, Inter-
national Association of Bridge, Structural and Orna-
mental Iron Workers, AFL-CIO.**

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE ISSUES PRESENTED	2
STATEMENT OF THE CASE	
A. IN GENERAL	2
B. FACTS AS TO INDIVIDUAL EMPLOYER RESPONDENTS	13
ARGUMENT	
I. ISSUES OF CREDIBILITY AND FINDINGS OF FACT INSOFAR AS THEY MAY HAVE BEEN DETERMINED ADVERSELY TO RESPONDENTS BY THE ADMINIS- TRATIVE LAW JUDGE, SHOULD BE DISREGARDED BY THE COURT.	19
II TESTIMONY AS TO COMMUNICATIONS BETWEEN ATTORNEY HERMAN BRICKMAN AND HIS RESPONDENT CLIENTS SHOULD HAVE BEEN SUPPRESSED.	30
III VARIOUS OF THE RESPONDENT EMPLOYERS EFFECTED A TIMELY WITHDRAWAL FROM GROUP BARGAINING AS A RESULT OF THE IMPASSE IN NEGOTIATIONS.	33
IV VARIOUS OF THE RESPONDENT EMPLOYERS EFFECTED A TIMELY WITHDRAWAL FROM GROUP BARGAINING AS A RESULT OF THE PRESENCE OF "UNUSUAL CIRCUMSTANCES".	38
V VARIOUS OF THE RESPONDENT EMPLOYERS EFFECTED A TIMELY WITHDRAWAL FROM GROUP BARGAINING AS A RESULT OF THE FACT THAT LOCAL 455 HAD ENGAGED AND WAS CONTINUING TO ENGAGE IN SURFACE BARGAINING WITH INDEPENDENT.	42
VI HAVING EFFECTED TIMELY WITHDRAWALS FROM GROUP BARGAINING, THE RESPONDENT EMPLOYERS ARE NOT AUTOMATICALLY SUBJECT TO A BARGAINING ORDER.	46

Table of Contents (Cont'd.)

	<u>Page</u>
VII EVEN ASSUMING ARGUENDO THAT NO TIMELY WITHDRAWAL WAS EFFECTED FROM MULTI- EMPLOYER BARGAINING, THE STIPULATION SIGNED BY THE FIVE EMPLOYERS WITH LOCAL 455 IN LATE JANUARY 1976, IS NOT BINDING UPON INDEPENDENT OR ANY OF THE RESPONDENT EMPLOYERS.	48
VIII ASSUMING ARGUENDO THAT LOCAL 455 WOULD OTHERWISE BE ENTITLED TO A REMEDIAL ORDER, THE SAME SHOULD HAVE BEEN DENIED IN THE INSTANT CASE BECAUSE OF THE VIOLATIVE ACTS OF LOCAL 455.	56
IX NO EMPLOYEE OF ANY RESPONDENT EMPLOYER IS ENTITLED TO REINSTATEMENT	59
CONCLUSION	63

AUTHORITIES CITED

<u>Cases</u>		<u>Page</u>
Allou Distributors Inc.	201 NLRB 47 (1973)	57
American Cyanamid Co.	129 NLRB 683 (1960)	43
Artcraft Mantel and Fireplace Company	174 NLRB #110 (1969)	57
Consumers Research Inc.	2 NLRB 57 (1936)	54
Hi-Way Billboards	206 NLRB #1 (1973)	38, 40
H. K. Porter Company, Inc. v. NLRB	397 U. S. 99 (1970)	54
Kaynard v. Independent Association of Steel Fabricators, Inc., et al	95 LRRM 2015 (E. D. N. Y. 76C1139)	41, 42, 49
Laura Modes Co.	144 NLRB 1952 (1963)	57
Local 3, Packinghouse Workers v. NLRB	210 F. 2d 325 (C. A. 8, 1954)	29
L. S. Ayres & Company v. NLRB	94 LRRM 3210, 81 CCH Labor Cases ¶13088 (C. A. 4, March 4, 1977)	26
Neville Foundry Co. Inc.	122 NLRB 1187 (1959)	46
NLRB v. Beck Engraving Co., Inc.	522 F. 2d 475 (C. A. 3, 1975)	36, 37
NLRB v. Burns International Security Services, Inc.	406 U. S. 272 (1972)	54
NLRB v. Central Plumbing Co.	429 F. 2d 1252 (C. A. 6, 1974)	36
NLRB v. Hi-Way Billboards Inc.	473 F. 2d 649 (C. A. 5, 1973)	36
NLRB v. John J. Corbett Press	401 F. 2d 673 (C. A. 2, 1968)	36
NLRB v. Local 810 I. B. T.	274 F. 2d 688 (C. A. 2, 1960)	29
NLRB v. Phelps	136 F. 2d 562 (C. A. 5, 1943)	29

Authorities Cited (cont'd.)

<u>Cases</u>	<u>Page</u>
NLRB v. Sheridan Creations, Inc. 357 F. 2d 245 (1966) cert. den. 385 U.S. 1005 (1966)	38, 48
NLRB v. TulsaSheet Metal Works, Inc. 367 F. 2d 55 (C.A. 10, 1966)	36
Otto Klein d/b/a Artistic Permanent Wave Co. 172 NLRB #223 (1968)	43
Pacific Coast Association of Pulp & Paper Manufacturers 163 NLRB 892 (1967)	37
Plasterers & Cement Masons, Local 2, 149 NLRB 1264 (1964)	45
Retail Associates 120 NLRB 388 (1958)	42
Scougal Rubber Mfg. Co. 126 NLRB #53 (1960)	46
Solar Aircraft Co. 109 NLRB 130 (1954)	43
Standard Oil Co. 137 NLRB 690 (1962)	44
The Evening News Association 154 NLRB 1494 (1965) enf'd. 372 F. 2d 569 (C.A. 6, 1967)	37
Thompsons Brothers Coal Company, Inc. 192 NLRB #5 (1971)	44
Union Nacional DeTrabajordes 219 NLRB #157 (1975)	57
U.S. v. Bigos 459 F. 2d 639 (C.A. 1, 1972), cert. den. 409 U.S. 847	31
Weeks v. United States 232 U.S. 383 (1914)	32
<u>Statutes, Regulations and Miscellaneous</u>	
28 Labor Law Journal 131	54
NLRB Statements of Procedure - Series 8	46

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

-and-

SHOPMEN'S LOCAL UNION NO. 455, INTERNATIONAL
ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL
IRON WORKERS, AFL-CIO,

Intervenor,

-against-

Index #77-4198

INDEPENDENT ASSOCIATION OF STEEL FABRICATORS,
INC.; ACHILLES CONSTRUCTION CO., INC., GREENPOINT
ORNAMENTAL AND STRUCTURAL IRON WORKS, INC.;
HEUSER IRON WORKS, INC.; IKENSON IRON WORKS, INC.;
KUNO STEEL PRODUCTS CORP.; MASTER IRON CRAFT
CORP.; MELTO METAL PRODUCTS CO., INC.; MOHAWK
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KOENIG IRON WORKS, INC.; TROJAN STEEL CORP.;
G. ZAFFINO AND SONS, INC.; ROMA IRON WORKS, INC., and
SHIPMEN'S LOCAL UNION NO. 455, INTERNATIONAL ASSOCIATION
OF BRIDGE STRUCTURAL AND ORNAMENTAL IRON WORKERS,
AFL-CIO,

Respondents,

-and-

LOCAL 810, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
AFL-CIO,

Intervenor.

-----x
ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR RESPONDENTS WITH THE EXCEPTION OF
HEUSER IRON WORKS, INC., SPIGNER AND SONS
STRUCTURAL STEEL CO., INC. and SHIPMEN'S LOCAL
UNION NO. 455, INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL AND ORNAMENTAL IRON
WORKERS, AFL-CIO.

STATEMENT OF THE ISSUES PRESENTED

(1) Whether the findings of fact and conclusions of law contained in the decision and order of the National Labor Relations Board are properly supported by the evidence.

(2) Whether the decision and order of the National Labor Relations Board is reasonably designed to effectuate the policies of the National Labor Relations Act as amended.

(3) Whether the decision and order of the National Labor Relations Board contains material and erroneous conclusions of law.

STATEMENT OF THE CASE

A. IN GENERAL

Respondent employers have for varying periods of time, been engaged as small companies in the steel fabricating and erecting industry in the metropolitan New York area. Prior to June 30, 1975, the production and maintenance employees of these Respondents had been represented by Local 455 pursuant to separate collective bargaining agreements between the Respondents and Local 455. The one general exception was the fact that at various past times, certain of these Respondents had been members of an industry trade association "Allied Building Metals Industries, Inc." ("Allied") which, for its part, had negotiated multi-employer collective bargaining agreements with Local

455. Over the years, three distinct characteristics marked the pattern of labor negotiations in this industry. Firstly, almost all labor negotiations had been characterized by costly and debilitating strikes since the return to power of the President of Local 455, William Colavito, in 1964 (A: 171 et. seq)¹. Secondly, the basic pattern of settlements in the industry was established between Local 455 and Allied; the non-affiliated employers (the "independents"), for the most part, being forced to agree to accept the basic economic settlements negotiated between Allied and Local 455. In fact, the contributions to the numerous health, welfare, pension and similar fringe benefit funds had been negotiated exclusively with Allied; the independents not even having had the opportunity to negotiate in this cost area (A: 384). Thirdly, and although the members of the Allied and the independents had been in direct competition with each other, as each successive contract was negotiated, Allied continued to receive more favorable working terms and conditions spelled out in its collective bargaining agreements than the independents in theirs. In fact, at the time the June 30, 1975 contracts expired, 56 differences existed in the two contracts and almost all gave the members of Allied competitive advantages over their independent competitors (A: 175 et. seq.). This last factor was aggravated by the fact that Local 455 consistently advised the independents that the contract being

1/ "A" references are to the pages of the Appendix.

given to them was identical to that of Allied. On those occasions when challenged by the independents to deliver upon its commitment, Local 455 simply reneged. The disparity of treatment is perhaps best illustrated by the fact that members of Allied were not even granted contracts identical to those enjoyed by them as members of Allied, at such time as they ceased to be members of Allied (and the then existing contract expired) (A: 689, 721 and 722). Acting individually, these independent shops were able to bring no economic power to bear upon Local 455 to either honor its commitments or negotiate essentially uniform contracts for competing employers. When the full list of differences between the Allied and independent contracts became known, a number of independents joined together in early 1975 and formed the Independent Association of Steel Fabricators Inc. ("Independent"). One of the functions of Independent, inter alia, was to negotiate with Local 455. Other functions were those usually associated with trade associations, including representation of its members in other collective bargaining negotiations.

Independent initially formulated a bargaining posture calling for it to negotiate from the Allied contract as a basic starting point. For reasons best known to Local 455, the function of the new association and its posture of seeking parity with Allied, aroused the complete wrath of Local 455. In the first instance, Local 455 refused to recognize four of the charter members of Independent as being represented by Independent

in the negotiations. These employers were Penner, Esco, Weatherguard and Balfour (GC: 25, 26, 27 and 28)². This position was taken notwithstanding the fact that a representative of Balfour was on the negotiating committee of Independent. (A: 1884, 1885). Moreover, the four or five pre-strike bargaining sessions with Independent can only be characterized as evidencing an absolute intent by Local 455 not to bargain seriously with Independent. It failed, neglected and refused to advise, or even hint to Independent, the wage increase it sought in the negotiations. Incredibly, no dollar figure was placed by Local 455 on its wage demand. Thus, at the time the strike began on July 1, 1975, Local 455 had not even stated what it was seeking. In the equally vital area of health, welfare, pension and fringe benefit fund contributions, Local 455 not only refused to inform Independent as to the amount of its demands, but also advised that it had no intention of ever bargaining with Independent in this regard. Rather it advised Independent that Independent and its members would be bound by the end result of negotiations with Allied; without allowing Independent to have any say in this matter. While conceivably Local 455 might have viewed as naive any attempt by Independent to obtain a contract comparable to that of Allied in one contract negotiation, the fact is that the refusal of Local 455

2/ "GC" references are to exhibits of the General Counsel.

to detail and negotiate with Independent in these two most vital regards, prior to the strike, evidences a preconceived intent by Local 455 not to bargain with Independent. Thus, on July 1st the strike began without Local 455 even having presented its economic demands to Independent (A: 200, 201 and 206).

During the month of July, no further meetings were had between Local 455 and Independent. While Local 455 negotiated a limited number of one year stipulations with non-affiliated companies in July, it did not even bother to officially advise Independent as to the terms of such settlements. Thus, through the month of July, in a totally depressed industry, highlighted by little work and massive unemployment, Local 455 continued a strike based on wage and other economic demands, not then even disclosed.

In August, Independent learned that one of its members ("Dextra") had consummated a separate collective bargaining agreement with Local 455, and outraged at what it considered to be both an immoral and illegal tact, Independent undertook two legal steps in an attempt to preserve both the sanctity of the multi-employer bargaining unit and the bargaining process. Inasmuch as the bylaws of Independent required six months advance notice of a member's resignation, it sought to obtain in a New York State Supreme Court, a temporary injunction against Dextra's resignation and its entry into the separate collective bargaining agreement

with Local 455. Simultaneously, it filed an 8(a)(5) charge against Local 455 with the National Labor Relations Board; alleging an intent to destroy the multi-employer bargaining unit. The State court refused to take immediate action and denied the application for the temporary injunction. More importantly, the National Labor Relations Board, Region 2, ruled that the multi-employer bargaining had broken down, an impasse had been reached, and Local 455 and Dextra were free to negotiate an agreement, separate and apart from the multi-employer bargaining (R:8)³. For all intents and purposes, the destruction by Local 455 of multi-employer bargaining had thus received both State and Federal blessing. Local 455, obviously encouraged by this development, subsequently signed a separate contract with Atwater (admittedly represented by Independent) (A:119, 120), agreed to bargain separately with North Shore and Charla (admittedly represented by Independent) (R:18, 19, 20 and 21), and signed separate contracts with Penner, Balfour, Esco and Weatherguard (or its parent) (A:155), although Independent claimed to represent all of these employers. It is undisputed that after Local 455 split the multi-employer bargaining unit by signing with Dextra, and after the two pronged legal attempt by Independent to restore the same was denied both judicially and administratively, Independent so advised its remaining employer members.

3/ "R" references are to exhibits of the Respondents.

Inasmuch as the Court would not enforce the six month resignation provision and the Board had decreed an impasse in bargaining, allowing individual employers to bargain and sign separately with Local 455, Independent advised its members as to the fact that it could no longer require them to conduct their bargaining through it (A:1897 et. seq.). Rather each as it saw fit, could on the basis of impasse, bargain separately with such labor organizations as represented its employees.

In August, and at the request of Independent, one further negotiating session was had between Independent and Local 455. For the first time (approximately one and one-half months after the inception of the strike), Local 455 placed a specific wage demand before Independent by advising it of its first year wage settlement with certain of the non-affiliated employers. In the area of fund contributions, Local 455 maintained its position of being prepared to bargain only with Allied.

Meetings between Local 455 and Independent were sporadic and ineffective in the months of September, October, November and December. While the Administrative Law Judge did not permit a full development of the record with respect to negotiations between Local 455 and Allied, it nevertheless appears that intensive negotiations took place between the two in this period of time. The negotiations were facilitated by the presence of a representative of Local 455's

parent International Union. No such intensive negotiations ever took place with Independent, nor was an International representative made available. The negotiations with Allied culminated in an offer being made by Allied in early December. Notwithstanding the then length of the strike and the totally depressed state of the industry, Local 455 rejected the offer without submitting the same to its membership for a vote. In an admittedly unprecedented move, the International overrode the decision of Local 455 and directed that the offer be submitted to the rank and file of the Local for approval or disapproval (A:218, 221 and 222). This was done in early January 1976, and the membership of the Local overrode the decision of its Local Union and voted to accept the offer of Allied.

Advised as to the settlement, Independent caused a meeting to be had with Local 455. Although the bargaining committee of Independent had only the authority to recommend a settlement to its employer membership (but not to actually consummate an agreement), it went on record at this meeting as stating that it would be prepared to recommend the acceptance of the Allied settlement if it could similarly obtain the Allied contract (A:1921). Notwithstanding the fact that the strike was then six and one-half months old, Local 455 rejected this offer out of hand (A:1921). It did so without taking a vote of its membership; obviously aware of the rebuff its membership had handed to

it with respect to the Allied offer. There is uncontradicted testimony in the record that Local 455 representative Kenneth Mannsman told Independent representative Murray Shiner, that if Colavito would grant the Allied contract to Independent, Colavito would have been sued by Allied (A:1656).

Shortly after this rebuff by Local 455, a meeting was held by the members of Independent to discuss their future course. At this meeting a limited number of employers indicated a willingness to accept the Allied settlement without the basic Allied contract. This sentiment was not shared by the majority of the employers (A:1052 et. seq.). This limited number of employers, totalling five, then received permission from Independent to negotiate separately with Local 455 on behalf of themselves only (A:1054). At this point in time, such formal permission was not required in view of the impasse determination of the Board, the Dextra contract, and the subsequent negotiations and settlements between Local 455 and individual members of Independent. However, the permission was given, Local 455 was notified in writing by Spigner on behalf of Independent that these individuals spoke only for themselves and not for the Independent as a group (R:13), and the individuals involved repeatedly so notified Local 455 (testimony of Kaplan, Doyle and Uydess). In a legal sense, all this was not necessary

to limit the authority of the five individual employers . As previously stated, no bargaining committee of Independent had the authority to consummate an agreement with Local 455. The By-laws of Independent (GC:43, Art. III, Sect. 11) provides for a negotiating committee, denominated as the Arbitration Committee, to negotiate with Local 455. Such Committee, in turn, reports to the Negotiating Advisory Committee, which in turn recommends rejection or acceptance to the full membership. The membership alone had the final say (A:1883, 1884). Thus, even if the limited authority of the five employers had not been made abundantly clear to Local 455, acceptance of any proposed settlement remained subject to full membership approval. Notwithstanding this fact, Local 455 having negotiated with the five employers, primarily with respect to their individual shop problems, rather than general employer-employee problems, sought to force these employers to sign "on behalf of the Independent Association". Each refused repeatedly and reasserted its lack of agent authority, and existence of authority only to speak for itself. Ultimately, all five signed separately in individual capacities. Each, however, was forced to add the words "as a member of the Independent Association" after its signature. This was done upon Local 455's representation that this was nothing more than a statement of fact, and did not indicate any representative status (A:1292).

Additionally, Local 455 indicated it would not settle with these employers unless such words were added. Once again it should be noted, that regardless of how the five signed, neither collectively nor individually could they bind Independent. At all times, Independent's membership had the final say on ratification or rejection. However, both Independent and the five employers went to great pains to disabuse Local 455 of any impression, of either implied or apparent authority. (ALJ:58; A: 2143).⁴

Thereafter, Local 455, in a sporadic manner, sought to advise certain of the Respondent employers that it considered them bound by the terms of the five separate agreements. It did this despite the manifest lack of representative status of the five employers and the failure of the Independent membership to ratify the same. Additionally, Local 455 negotiated a separate contract with Trojan, differing in major respects from the agreements with the five employers (which differed even amongst themselves), negotiated a separate contract with Heuser and entered into protracted negotiations covering a period of approximately two months with Peelle. The Peelle negotiations covered the entire ambit of a proposed contract; not merely particular problems of Peelle as contended by Local 455. In fact, rather than evidencing any belief that Trojan or Peelle was bound by the contracts with the five employers, the negotiations by Local 455 with these two employers demonstrate clearly that not even Local 455 believed these contracts binding upon any parties other than the five signatories.

4/ "ALJ" references are to the pages of the Decision of the Administrative Law Judge, adopted by the Board.

Lastly, it is to be noted that Local 455 on an equally sporadic basis, advised that certain of the Respondent employers were wrongfully refusing to reinstate the strikers. These statements, however, proceeded on the basis that the refusal was wrongful and the offer to return unconditional, only if it be assumed that the remaining unsigned employers were bound by the contracts of the five signing employers. For, as stated by representatives of Local 455, the strikers were not offering to return except under the terms of the contract signed with the five (A:965, 966). If the remaining Respondent employers were not to be considered bound by these contracts, the strikers were not prepared to abandon the strike and return to work either without a contract or under the terms of the contract that had expired on June 30, 1975.

B. FACTS AS TO INDIVIDUAL
EMPLOYER RESPONDENTS

Achilles Construction Co., Inc.

This employer signed neither with Local 455 nor Local 810. It is charged with no violative acts other than refusing to bargain with Local 455 through Independent and further refusing to agree to be bound by the terms of the contract signed by the five employers.

Greenpoint Ornamental and Structural Iron Works, Inc.

This employer signed an agreement with Local 810 on or about November 20, 1975, after Region 2 of the Board had ruled

that an impasse had been reached in the bargaining with Local 455. It is further charged with wrongfully discharging certain of its employees on November 10, 1975. In fact, ~~the~~ allegedly discharged employees had already been on strike for in excess of five months, and had been merely and legally notified that if they did not return to work by November 10th, their jobs would be filled by economic replacements (R: 22). Insofar as it is alleged that these employees were improperly denied reinstatement, the fact is that they never offered to return unconditionally; only offering to return under ~~the~~ terms of the non-binding contracts signed by the five employers.

Kuno Steel Products Corp.

This employer signed neither with Local 455 nor Local 810. It is charged with no violative acts other than refusing to bargain with Local 455 through Independent and further refusing to agree to be bound by the terms of the contract signed by the five employers.

Long Island Steel Products Co., Inc.

This employer signed with Local 810 on or about January 6, 1976, after Region 2 of the Board had ruled that an impasse had been reached in bargaining with Local 455. In most other major respects, the factual pattern at this company is similar to that at Greenpoint.

Melto Metal Products Co., Inc.

This employer signed with Local 810 on or about December 22, 1975, after Region 2 of the Board had ruled that an impasse had been reached in bargaining with Local 455. No witnesses testified against the employer and in all other respects, the allegations and lack of proof parallel the situations with respect to Achilles and Kuno.

Master Iron Craft Corp.

This employer did not sign with Local 810 until on or about January 28, 1975, not only after the reaching of impasse, but also subsequent to the last meeting between Independent and Local 455 in January 1976. Its signing with Local 810 took place only after the majority of its employees evidenced in writing the designation of that Union as their bargaining representative. (A: 1656-1661)

Mohawk Steel Fabricators, Inc.

This employer signed with Local 810 on or about January 9, 1976, after Region 2 of the Board had ruled that an impasse had been reached in bargaining with Local 455. This contract was negotiated and signed after Mohawk employees voluntarily joined Local 810. (A:1445-1452) In all other respects, the allegations and lack of proof parallel the situations with respect to Achilles, Kuno and Melto.

The Peelle Company

This employer has signed neither with Local 455 nor Local 810. It is charged with no violative acts other than refusing to bargain with Local 455 through Independent, and further refusing to agree to be bound by the terms of the contract signed by the five employers. It engaged in extensive and direct collective bargaining negotiations with Local 455, subsequent to the time the five employers signed contracts with Local 455 and up until approximately early April 1976, when it became apparent to both parties that no agreement could be reached.
(A: 1625-1631)

Roman Iron Works, Inc.

This employer signed with Local 810 on or about November 18, 1975, at such time as Region 2 of the Board ruled that an impasse had been reached in bargaining with Local 455. In all other respects, the allegations and lack of proof parallel the situations with respect to Achilles, Kuno, Melto, Mohawk and Peelle.

S. Cervenka & Sons, Inc.

This employer signed with Local 810 later than any other employer, on or about February 17, 1976. In all other respects, the allegations and lack of proof parallel the situations with respect to Achilles, Kuno, Melto, Mohawk, Peelle and Roman.

Paxton Metalcraft Corp.

This employer signed with Local 810 on or about December 5, 1975, after Region 2 of the Board had ruled that an impasse had been reached in bargaining with Local 455. This contract was negotiated and signed after Paxton employees voluntarily joined Local 810.

(A: 1386-1396). In all other respects, the allegations and lack of proof parallel the situations with respect to Achilles, Kuno, Melto, Mohawk, Peelle, Roman and Cervenka.

Koenig Iron Works, Inc.

The employees of this employer, members of Local 455, never struck the employer on behalf of Local 455 during the strike. Rather, all continued to work, voluntarily joined Local 810, and at a subsequent time, unanimously struck this employer on behalf of Local 810. (A: 1338-1349) In the face of a strike by all of its employees on behalf of Local 810, this employer was obligated to and did negotiate with Local 810 and did sign a contract with it on or about January 30, 1976.

Trojan Steel Corp.

This employer, the object of persistent threats, intimidation and violence by Local 455, was forced to sign with Local 455. It never signed a contract with Local 810.

G. Zaffino & Sons, Inc.

This employer, which did not employ any workers, perform any work, or obtain any work contracts since prior to the strike on June 30, 1975, signed neither with Local 455 nor Local 810. (A: 865-866)

Roma Iron Works, Inc.

Although charged with having signed a contract with Local 810, the record did not so indicate and the Board did not so find.

Ikenson Iron Works, Inc.

This employer signed neither with Local 455 nor Local 810. It is charged with no violative acts other than now refusing to bargain with Local 455 through Independent and further refusing to agree to be bound by the terms of the contract signed by the five employers. Seymour Ikenson gave uncontradicted testimony that Ikenson withdrew bargaining authority from Independent, had nothing to do with any other Union, authorized no person to negotiate a settlement for it with Local 455, had laid off all of its employees for lack of work prior to the strike and had no work during the strike (A: 1465-1475).

ARGUMENT

I

ISSUES OF CREDIBILITY AND FINDINGS OF FACT, INsofar AS THEY MAY HAVE BEEN DETERMINED ADVERSELY TO RESPONDENTS BY THE ADMINISTRATIVE LAW JUDGE, SHOULD BE DISREGARDED BY THE COURT.

The findings of the Administrative Law Judge (affirmed by the Board) in the areas of credibility and facts, are so contrary to the only evidence in certain instances, so contrary to the weight of the evidence in other instances, and are so indicative of a failure to afford the Respondents a fair hearing, that they should be disregarded in their entirety insofar as they are adverse to Respondents.

The underlying thesis of the Decision is that there was a concerted attempt upon the part of the Respondents to remove Local 455 and to replace it with Local 810. Viewed in that context, certain disputed issues of fact, are resolved against Respondents and, in turn, form the basis for further adverse findings of fact. One such issue, involves the August meeting between Colavito and Spigner. The Administrative Law Judge credits Colavito's testimony over that of Spigner. In the first instance he credits Colavito because "Spigner, in testifying, specifically admitted there was a discussion of the

Teamsters * * * " and that "Spigner added that three of the members of the Association were ready to sign up with the Teamsters, probably referring to Local 810" (ALJ: 11; A: 2096). In fact, Spigner, not "probably", but specifically, was referring to two shops having "been approached by Local 819 of the Teamster Union" (A: 1910); a fact recognized by the Board in footnote 1 of its Decision (A: 2197). This is not a mere confusion of identities upon the part of the Administrative Law Judge. The error goes to the very heart of the decision. Local 819 is no way related to the principal issues in this case. Not one of the Respondents is charged with ever having approached or been approached by that union. Yet the Administrative Law Judge erroneously states that Spigner was probably referring to Local 810, a party to this case, and uses that fact as evidence of Respondents' prior and then continuing intent to accomplish a change of unions to Local 810.

Further to buttress his finding that Spigner's version of the August meeting is not to be credited, the Administrative Law Judge states that (i) Spigner testified that he knew nothing about Local 810 or (ii) that the Teamsters had approached any members of the Association. The latter statement is a misstatement of the testimony of Spigner. At A: 1981, 1982, Spigner stated specifically that he had no knowledge of the Teamsters approaching any Association members with the

exception of Charla and North Shore. The former statement is impugned by the Administrative Judge on the basis of his finding that one Herman Brickman had discussed Local 810 with Association members in the presence of Spigner. What the Administrative Law Judge "overlooked" is that such discussion, if it took place at all, occurred not in August or prior thereto, but in October (A:1038, 1051). Nothing in the record supports the conclusion that Brickman in the presence of Spigner discussed Local 810 prior to Spigner's meeting with Colavito in August. Moreover, the testimony of Seymour Kaplan, credited by the Administrative Law Judge, shows clearly to the contrary.

Thus the three bases for crediting Colavito rather than Spigner as to the content of the August meeting, not only have no support in the record; they are clearly contrary to the record. Additionally, the Administrative Law Judge was more than charitable in characterizing the testimony of Colavito, whom he credited in this instance. Whereas one might objectively characterize Colavito as being deliberately evasive on the basis of the Administrative Law Judge's own observations (ALJ:47 fn. 41, A:2132), the Administrative Law Judge merely refers to Colavito testifying "in his own inimitable manner".

Next and in reference to the meeting Mr. Silverman had with the Association, the Administrative Law Judge states (ALJ:15;

A:2100) that Silverman explained" the advantages that Local 810 could give to the Employers involved relative to pension plans, retirement plans, and other terms and conditions of collective bargaining". This is alleged to be part of the credited amalgam of the testimony of Seymour Kaplan. In fact, Mr. Kaplan testified that the discussion by Silverman was in reference to the advantages in these areas to the Employees and not the Employers. Kaplan was most specific and the Administrative Law Judge misstated his testimony. Similarly the testimony of Peelle is cited in support of the conclusion that Brickman informed the Association members that other labor unions had no objection to organizing the employees of the members (ALJ:16 fn. 11; A:2101). Peelle gave no such testimony.

A similar misstatement appears in connection with the issue of impasse. It is one thing for parties to disagree as to the presence of impasse or the breaking of the same. It is quite another for there to be a misstatement in the Decision as to the testimony. The administrative Law Judge twice makes the statement that the January 14, 1976, meeting ended with an agreement to continue negotiations and meet again (ALJ:44, 49; A:2129, 2134). The significance lies in the fact that that continuation of negotiations and agreement on future meetings is given as indicia of a break in impasse. In fact, Spigner testified

that when the Mediator advised the Association on January 14th of the rejection by Local 455, "That terminated our meeting" (A:1921).

Colavito testified that the meeting ended on the basis of the parties being called by the Mediator (A:414). Certainly, neither testified that there was an agreement to continue negotiations, much less schedule another meeting. What is involved in the Decision then, is not merely a misinterpretation of the Record; rather there is a complete disregard of it.

Similar errors appear in the recitation of the occurrences at the various shops. Most striking is the minimal acceptance given to the testimony of Arnold and Stuart Feinglass. While it is within the province of the Administrative Law Judge to, at least in the first instance, credit testimony, it is not within his province to misstate or ignore testimony. The following are examples of the same:

(i) The Administrative Law Judge gives little credence to the claim that Local 455 agent Steinhauser attempted to assault Arnold Feinglass. After all, points out the Administrative Law Judge (ALJ:37 fn. 32; A:2122), Arnold Feinglass testified that Steinhauser was not able to grab his legs, but Stuart Feinglass testified that he did. Such a discrepancy, even if it existed, is of such a minimal nature so as to be disregarded; unless one were looking to discredit the testimony. Note, however, that Stuart testified that he didn't know if Steinhauser

had actually been able to grab his father (A:1549). Moreover there was no denial by Steinhauser. Yet, the Administrative Law Judge characterizes the behavior of Steinhauser as understandable (ALJ:37; A:2122).

(ii) The Administrative Law Judge concludes that a spitting incident did not actually occur, since Stuart Feinglass and his mother shortly thereafter had coffee and spoke to Steinhauser (ALJ:37; A:2122). In the first place, Steinhauser did not testify and deny the incident, and in the second place, the coffee incident occurred on a different day. The coffee incident occurred on October 10 (A:1507 et seq.) and the spitting incident on October 14th (A:1515, 1516).

(iii) The Administrative Law Judge did not credit the testimony that pickets threatened to kill Stuart Feinglass in the presence of Local 455 agents Steinhauser and Buffalino (ALJ:36, A:2121). Since neither Steinhauser nor Buffalino testified and denied the incident, the Administrative Law Judge justified his conclusion by asserting that he did not believe the incident would have occurred in front of broadcast reporters. The Administrative Law Judge seems to have forgotten that Steinhauser was criminally convicted of throwing a rock through the windshield of a moving car driven by Stuart Feinglass, in front of the police.

(iv) The Administrative Law Judge concludes that Stuart Feinglass was exaggerating or could have been exaggerating as to other incidents (ALJ:36; A:2121). Since there was no denial of the accuracy of the testimony of Stuart Feinglass, there is no basis for this conclusion (other than a pre-determined intent to disbelieve).

(v) The Administrative Law Judge disregards testimony as to the following of trucks and passenger vehicles, as well as threats made with bats, notwithstanding the fact that the alleged perpetrators did not testify and deny the incidents.

(vi) The Administrative Law Judge makes no mention, not even one word, of the most violent of the incidents at Trojan (A:1511-1513). This is totally inexcusable.

(vii) The Administrative Law Judge seems to condone all incidents at Trojan as being the natural outgrowth of Arnold Feinglass hitting a picket with a vehicle. He states that the incident undoubtedly occurred since Arnold Feinglass did not deny it (ALJ:37; A:2122). The Court should remember that the first mention of this alleged incident came upon the rebuttal case of General Counsel (A:1761) and Arnold Feinglass had already finished testifying. Additionally, the attention of the Board is called to A:1788-1792, for a view of whether this belated alleged incident ever occurred. While the

Administrative Law Judge chose to disregard this testimony, the Court should not.

It is strange to note that the testimony of various interested employees was credited as being uncontroverted (ALJ:18 fn. 12, 19 fn. 13, 19 fn. 14; A:2103, 2104), yet testimony as to the acts of Union agents Bell, Steinhauer, Buffalino and Schiffano, received grudging acceptance at best, although similarly uncontroverted.

Mario Plaza is credited despite testimony at A:1844-1856 that characterizes him as being totally unworthy of belief. Why is he credited? The Administrative Law Judge states he is to be credited since he is likely to tell the truth, being presently in the employ of Trojan (ALJ:22 fn. 17; A:2107). This approach was rejected by the United States Court of Appeals for the Fourth Circuit in L. S. Ayres & Company v. N. L. R. B. 81 CCH Labor Cases Sec. 13088, 94 LRRM 3210 (March 4, 1977) wherein the Court stated that an Administrative Law Judge should not give a witness more credibility because he is currently employed by the alleged offender, since the fact that a witness is an employee at the time that he testifies adversely to his employer is at most only a factor bearing upon his credibility, and is entitled to little weight unless it is established that he does not know he is protected in testifying.

The Administrative Law Judge indicates that the testimony of Bruno Zaffino is contrary to that of his employees as to the question of whether he invited them to drive with him to the office of Local 810 (ALJ:24; 2109). Was the Administrative Law Judge unmindful of the testimony of General Counsel's witness employee Catalano, who testified at A:575?:

"And we said we'd take a run down with him and see what the heck he was talking about."
(emphasis supplied)

Similarly, the Administrative Law Judge states that Bruno Zaffino "showed Joseph Reiss and others, Local 810 literature" (ALJ:22; A:2107), when Mr. Reiss, produced as a witness by the General Counsel, testified that it was fellow 455 member Joe Zaffino who gave him the literature (A:482).

The Administrative Law Judge gratuitously states that "it may well be that there were some exaggerations in Kenneth Leistner's testimony", (ALJ:31 fn. 28; A:2116) although he cites not the slightest support for this conclusion.

The Administrative Law Judge in dismissing 8(b) charges relating to incidents at S. Cervenka & Sons, Inc., states "there was no testimony offered by any witness that such witness actually saw the tire being punctured (ALJ:33 fn. 31; A:2118). In fact, Mr. Cervenka testified in part as follows (A:1122):

"I saw one of the 455 pickets walk up to the front left hand tire of his car, reach down with what he had, what looked to be an ice pick in his hand and stick it in the tires, in the tire, and * * ".

The same general approach is implicit in the Decision of the Administrative Judge insofar as it relates to the incidents at Paxton. Notwithstanding the testimony of the Respondent's witnesses, the Decision substantially minimizes the violence. This occurs notwithstanding (i) the failure of Mr. Bell to testify and controvert the allegations, and (ii) the conflicting testimony of General Counsel's witnesses. Mannsmann (A:1795) and Plaza (A:1857).

The same approach is adopted with reference to the testimony of employee White of Mohawk (ALJ:35; A:2120). The Administrative Law Judge disregards or minimizes the testimony, although it falls within an overall pattern of threats, coercion and violence.

Where inferences cannot reasonably be drawn, the Administrative Law Judge has seen fit, nevertheless, to draw them against Respondents. See for example, the assumption (ALJ:42; A:2127) that the Regional Director of Region 2 was basing his determination of impasse on pre June 30 occurrences (an assumption with no support in the record since the Dextra matter came up in late July or early August (A:1896). Where inferences can (indeed "should") reasonably be drawn, the Administrative Law Judge has refused to draw them

against Local 455 (ALJ:31, 32 fn. 29; A:2116, 2117 relating to the Mason incident).

It is conceded that certain of the above examples, standing alone, should not significantly affect the outcome of this litigation. Taken together, however, they constitute a pattern of disregard for the testimony, disregard for the facts, and a bias against the Respondents. The Decision is replete with other errors and misstatements of fact, casting grave doubt upon its merits and also impugning the processes of the Board. For example, Ted Lincke is not merely an "individual" (ALJ:32; A:2117); he was also a striking employee of Long Island, and a member of Local 455, who coincidentally testified in this matter.

The Administrative Law Judge's evaluation of the testimony, accepted by the Board, was erroneous, irrational and "hopelessly incredible", and should be reversed by this Court, NLRB v. Local 810 I. B. T., 274 F.2d 688 (C.A. 2, 1960). The presumption of correctness, usually attributed to the findings of an Administrative Law Judge should not be adhered to since the Record shows such bias, unfairness and disregard for the facts by the Administrative Law Judge so as to amount to a denial of a fair hearing to the Respondents, Local 3, Packinghouse Workers v. NLRB, 210 F.2d 325 (C.A. 8, 1954); NLRB v. Phelps, 136 F.2d 562 (C.A. 5, 1943).

II

TESTIMONY AS TO COMMUNICATIONS BETWEEN ATTORNEY HERMAN BRICK- MAN AND HIS RESPONDENT CLIENTS SHOULD HAVE BEEN SUPPRESSED.

The Administrative Law Judge permitted testimony as to conversations between attorney Herman Brickman and his Respondent clients. Permission was given over the timely objection made on behalf of the Respondent clients at the hearings. The Administrative Law Judge permitted the testimony because of the presence of non-clients at the time of the communications from Brickman (A:995, 1003). In his Decision, the Administrative Law Judge reiterated this basis for his ruling and then added that since Brickman's advice may have tended to persuade the Respondents to violate the Act, the testimony would be admissible under the common law rule adopted in the Federal Rules of Evidence, Section 501 (ALJ:16 fn. 10; A:2101). Neither rationale suffices as a basis for the admission of the evidence.

Seymour Kaplan testified that the only other persons present when Brickman addressed his clients, were "other people that were interested" and these other interested persons were other independent employers involved in the industry (A:993). It has been established that the presence of a non-client does not automatically

destroy the attorney-client privilege. In U.S. v. Bigos 459 F.2d 639 (C.A. 1, 1972), cert. den. 409 U.S. 847, the Court stated that the presence of a third party destroys the privilege only insofar as it is indicative of the intent of the parties that their communication not be confidential. The Court went on to uphold the privilege even though a third party had been present at the time of the communication. In the instant case, the only persons present besides Brickman and the Respondent clients were specially invited third parties; all of whom were independent employers in the industry, all on strike and all potential members of Association. The presence of such third parties, so narrowly circumscribed as to class, is not indicative of an intent to waive confidentiality. Note that no person other than independent employers were permitted to hear the communications. Thus the privilege, having been timely asserted, should have been upheld.

In the second place, there is nothing in the record which indicates that Brickman advised his clients to pursue a course that would violate the Act. Even assuming arguendo that Brickman's notifying his clients that other unions might be interested in representing the employees because of the economy (A:995), but also notifying them that "it would have to come from the men" (A:1004), triggered actions on the part of the clients that violated the Act, there is nothing in the record to indicate that Brickman counselled such actions.

The Decision of the Administrative Law Judge is vulnerable on the basis of its failure to give recognition to the record and its repeated and material errors of fact. The vulnerability is accentuated by the use, albeit erroneously in many instances, of privileged communications. It is even doubtful whether the striking of findings based on those communications would purge the Decision; the entire decision having been tainted by the use of otherwise inadmissible evidence.

Weeks v. United States, 232 U.S. 383 (1914).

III

VARIOUS OF THE RESPONDENT EMPLOYERS EFFECTED A TIMELY WITHDRAWAL FROM GROUP BAR- GAINING AS A RESULT OF THE IM- PASSE IN NEGOTIATIONS.

On November 21, 1975, the Regional Director of Region 2 determined administratively that a legitimate impasse had been reached in the bargaining between Independent and Local 455, and negotiations had ceased. He further determined that Dextra's separate negotiations and agreement with Local 455 occurred subsequent to this collapse in negotiations.

"Rather the evidence establishes that collective bargaining negotiations took place between the parties for some time prior to June 30, 1975, at which time a legitimate impasse was reached and negotiations ceased, * * * Rather, the member-employer withdrew from your association subsequent to the collapse of negotiations and chose to negotiate with the Union on an individual basis." (R:8)

Both Colavito and Spigner agreed that no bargaining sessions were held in July, only one was held in August, and minimal amount of non-productive sessions were held during the balance of 1975. Only one session was had between Independent and Local 455 in 1976; and the strike continues to this very date against all of the Respondents except those who ultimately signed contracts with Local 455.

Certainly, one cannot question the fact that a legitimate impasse was reached in the summer of 1975.

It is submitted that this impasse in bargaining, administratively recognized by Region 2, and communicated to the membership of Independent (A:1898) standing alone, and certainly when coupled with (i) the failure to obtain temporary injunctive relief in the State court (A:1898), (ii) the prolonged nature of the strike, (iii) the economic difficulties faced by all of the Respondent employers, and (iv) the prospects for a total cessation of business resulting from a combination of the lack of construction business and the extensive length of the strike, justifies as a matter of law, the withdrawal by the individual Respondent employers from multi-employer bargaining with Local 455.

The Administrative Law Judge impliedly assumed the existence of impasse at two separate points in time, but then concluded the impasse in each case had been subsequently broken. In the first instance he assumed an impasse as at June 30, 1975, broken, however, by the proposal of Local 455 circulated in August (ALJ:42; A:2127). His conclusion does not withstand analysis. Clearly the issue creating the impasse was the existence of the 56 differences (ALJ:9-11; A:2094-2096). Nothing in the August modification dealt with or indicated a softening of the position of Local 455 on this, the key issue. Conversely, nothing indicated a change of position on the part of Independent. This is best attested to by the fact that after

this August meeting, little was done in the way of further negotiations, much less the making of progress. The January 14, 1976 meeting certainly did not break the impasse as concluded by the Administrative Law Judge (ALJ:44; A:2129), since the meeting reaffirmed the positions of the parties which had not changed since the prior June. It appears that the Administrative Law Judge predicates his conclusion of an ending of the impasse on the scheduling of further meetings after January 14. As hereinbefore stated, the Administrative Law Judge erred in this regard, since no further meetings were scheduled. Assuming *arguendo*, however, that further meetings had been scheduled, the same would nevertheless not indicate an ending of the impasse. The fact that parties agree to meet, and then do nothing more than reiterate long held positions, does not indicate a break in a deadlock. Rather it reinforces the existence of the deadlock. It is most difficult to comprehend the conclusion of the Administrative Law Judge (affirmed by the Board) that the impasse had at any time been broken, when seven months after the inception of the strike, the same issues that initially separated the parties, continued to separate them -- and in an unaltered form.

This Court should not abdicate its responsibility to determine whether the record as a whole contains substantial evidence in support of the finding that no impasse existed. This approach

was adopted by the 5th Circuit in NLRB v. Hi-Way Billboards Inc., 473 F.2d 649 (1973). In that case, the Court rejected the conclusion of the Board that an impasse had not existed and determined for itself that a genuine impasse had in fact existed.

Nor is the fact that a settlement was ultimately reached with certain individual members of Independent, indicative of the fact that an impasse had not been reached on any prior date, NLRB v. Hi-Way Billboards Inc., supra; NLRB v. Beck Engraving Co., Inc., 522 F.2d 475 (C.A. 3, 1975).

The four Circuit Courts of Appeal which have passed on the precise point have all held that impasse justifies unilateral withdrawal from a multi-employer bargaining unit.⁵ The 3rd Circuit in NLRB v. Beck Engraving Co. Inc., (supra), at page 483, stated as follows:

"We therefore join the Ninth, Fifth and Eight Circuits and hold that a negotiating impasse justifies unilateral withdrawal from a multi-employer bargaining unit, NLRB v. Associated Shower Door Co. Inc., 512 F.2d 230 at 232

5. The examination by this Court in NLRB v. John J. Corbett Press, 401 F.2d 673 (1968), into the existence of a bargaining impasse in that case, seems to indicate that it too would permit unilateral withdrawal from a multi-employer bargaining unit in the presence of an impasse; similarly the 6th and 10th circuits, NLRB v. Central Plumbing Co., 429 F.2d 1252 (1974) and NLRB v. Tulsa Sheet Metal Works, Inc., 367 F.2d 55 (1966).

(9th Cir. 1975), pet. for cert. filed
44 U.S.L.W. 3062 (U.S. July 23, 1975)
(No. 75 - 127); NLRB v. Hi-Way Billboards,
Inc., 500 F. 2d 181 at 183-184 (5th Cir. 1974);
Fairmont Foods Co. v. NLRB, supra at
1172-1173 & 1174, n. 1."

The rationale of the four Circuits is that the Board having committed itself to preserving the equality of withdrawal rights in the multi-employer unit situation, The Evening News Association, 154 NLRB 1494 (1965), enf'd. Sub nom Detroit Newspaper Publishers Association v. NLRB, 372 F. 2d 569, 572 (C.A. 6, 1967), it must in fact afford employers equal withdrawal rights. Since the Board has held that a union which has commenced collective bargaining with a multi-employer unit may withdraw from the multi-employer unit with respect to one or more employers while continuing multi-employer bargaining with the employers remaining in the multiple unit, Pacific Coast Association of Pulp & Paper Manufacturers, 163 NLRB 892 (1967), it must permit similar withdrawal by any one or more of the employers. The Board however may argue to this Court that this rule does not apply to this case, arguing that Local 455 did not initiate the negotiation of individual interim agreements during the bargaining.^{6/} This contention was made in NLRB v. Beck Engraving Co. Inc., (supra). The Court rejected the

6. In fact, however, Local 455 agreed to separate negotiations and/or agreements with the following employer members of Independent: Atwater, Balfour, Charla, Dextra, Esco, North Shore and Penner.

contention, stating as follows:

"The employer's right to withdraw during a bargaining impasse cannot be made contingent upon the union's prior exercise of its right to negotiate individual interim agreements. The rights of the parties should accrue simultaneously based upon the occurrence of an event, which neither can manipulate (e. g., impasse). Were the rule otherwise, the party whose right accrues first would be given a tremendous bargaining advantage and leverage. We recognize that, to some extent, basing the right of withdrawal upon the existence of an impasse rather than of individual negotiations contributes to instability within the context of multi-employer bargaining. Certainly, that is the result in this case. But we cannot avoid the conclusion that this additional incremental instability, however unfavorable to the policy aimed at stabilization of these units, is a necessary concomitant of ensuring that the parties have equal rights and that the existence and implementation of such rights do not grant unfair advantage to either party."

It should also be noted that the decision of this Court in NLRB v. Sheridan Creations, Inc., 357 F. 2d 245 (1966), cert. den. 385 U. S. 1005 (1966) does not in any way indicate a position in conflict with those established in the four Circuits. Sheridan did not deal with the issue of impasse.

IV

VARIOUS OF THE RESPONDENT EMPLOYERS
EFFECTED A TIMELY WITHDRAWAL FROM
GROUP BARGAINING AS A RESULT OF THE
PRESENCE OF "UNUSUAL CIRCUMSTANCES".

The Board, in its supplemental decision in Hi-Way Billboards,

206 NLRB No. 1 (1973) stated as follows:

"In cases after Retail Associates, the Board has limited application of the term "unusual circumstances" to those cases in which the withdrawing employer has been faced with dire economic circumstances, i. e., circumstances in which the very existence of an employer as a viable business entity has ceased or is about to cease. Thus, the Board has held that an employer may withdraw from a multi-employer bargaining association after negotiations with the union have begun where the employer is subject to extreme economic difficulties which result in an arrangement under the bankruptcy laws, where the employer is faced with the imminent prospect of such adverse economic conditions as would require it to close its plant, or where the employer is faced with the prospect of being forced out of business for lack of qualified employees to do the job and the union refuses to assist the employer by providing replacements for the employees he lost."

There can be no doubt that the industry of which these employers are a part (as well as these employers themselves), are and have been confronted for some time with dire economic circumstances, imperiling their very existence. One need only read the testimony of the various witnesses called by General Counsel, to determine the extremely limited number of persons then employed by the Respondent-employers, compared to the number employed just prior to the strike or even earlier. One need not guess as to how little work is available to the employers. Seymour Ikenson testified on July 7, 1976, that his company has done no production work since July 1, 1975 (A:1472); Bruno Zaffino testified on June 29, 1976, that his company had not closed a job in fourteen months (A:866); Henry Peelle testified that his company was being forced to perform its manufacturing operations previously done at its Local 455

location, at other locations in order to be competitive (A:1634 et. seq.). The entire record, from beginning to end, presents a picture of a deeply depressed industry, with minimal work, minimal employment opportunities and a strike of seemingly interminable duration. This coupled with an obvious antipathy of Local 455 towards Independent, the lack of meaningful bargaining between Local 455 and Independent, Local 455's refusal to give specifics of its economic demands to Independent until after the inception of the strike, Local 455's refusal to bargain with Independent on the question of contributions to the various Funds, the threats and violence directed towards members of Independent, and the actions of Local 455 in attempting to dissipate the power of Independent by bargaining separately with its members, when viewed in any combination or in their totality, present a clear and convincing case of most unusual circumstances. It is submitted that the illustrations cited in Hi-Way Billboards (supra) are far less drastic or unusual than in the instant case in which the very existence of each Respondent employer was jeopardized by its remaining as part of the multi-employer group, inasmuch as there was no reasonable possibility (much less probability) that the strike could be settled through that form of collective bargaining. Absent a likelihood of settlement, and in the presence of the otherwise dire economic picture, survival in part depended on being able to effectuate a labor settlement on an individual basis.

Subsequent to the close of the hearing, but prior to the time the Decision of the Administrative Law Judge was handed down, the Regional Director of Region 29, petitioned the United States District Court for the Eastern District of New York for a Section 10(j) injunction in this matter. Judge Dooling in denying in its entirety the relief sought by the Regional Director, described the state of the Respondent employers as follows, 95 LRRM 2015, 2020: (E. D. N. Y. 76 C 1139):

"The present case is not that of one recalcitrant employer flouting the manifest command of law but is the case of an economically beleaguered group of marginal secondary industrial units locked in an essentially solutionless labor problem."

Judge Dooling's description makes it clear that the Board disregarded its own interpretations of "unusual circumstances".

There is additionally another most unusual and unique circumstance present in this case. At page 58 of his decision (A:2143), the Administrative Law Judge states as follows:

"It is true that under the Board's original theory with regard to multi-employer bargaining as set forth in the case of Retail Associates, consent is necessary to the formation of multi-employer bargaining and is based at its inception on consent of the employees, their employer and the Union involved. In the case at bar, it is possibly arguable that the withdrawal on January 16, 1976, constituted a withdrawal of such consent by the vast majority of the original Employers who constituted the multi-employer bargaining group. They having withdrawn from such multi-employer bargaining, the bargaining group was by that withdrawal completely destroyed because the consensual conception of multi-employer bargaining was at the same time destroyed for all practical purposes."

Having posed the argument, the Administrative Law Judge then proceeded to reject it, at least as far as the facts in the instant case are concerned.

The same sort of analysis was made by Judge Dooling in denying the Section 10(j) injunction application, 95 LRRM 2019:

"Here multi-employer representation was a short lived expedient invoked without discussion with Local 455 to gain relief from the supposed rigors of and discriminations of individual bargaining. The history had been one of individual bargaining, arguably at Local 455's ordination, and one possible factual conclusion is that multi-employer bargaining simply failed. The case is not one of a single or of a minority withdrawal from group representation, but rather, of majority abandonment of it before a majority contract had been negotiated. (emphasis supplied)

The entire consensual underpinning of group bargaining having collapsed, majority withdrawal was permissible (even in the absence of impasse), thus relegating Local 455 and each employer to such bargaining rights and obligations as existed directly between them. Such an approach does no violence to Retail Associates, 120 NLRB 388 (1958) nor succeeding cases. Rather it underscores the consensual nature of group bargaining, while at the same time limiting withdrawal to those few situations deemed appropriate by the Board.

V

VARIOUS OF THE RESPONDENT EMPLOYERS
EFFECTED A TIMELY WITHDRAWAL FROM GROUP
BARGAINING AS A RESULT OF THE FACT THAT
LOCAL 455 HAD ENGAGED AND WAS CONTINUING TO
ENGAGE IN SURFACE BARGAINING WITH INDEPENDENT.

Respondent employers asserted throughout the hearing that Local 455 had failed to bargain in good faith and had, at best, engaged in "surface bargaining". It was and is contended that such conduct on the part of Local 455 justified withdrawal from the multi-employer bargaining.

In the instant case, Local 455 failed to submit wage (Sec. 24 of GC:21), vacation (Sec. 16(E) (i) of GC:21) and Fund contribution (Sections 26-31 of GC:21) proposals to Independent prior to the commencement of the strike. Similarly it refused to bargain with Independent at any time concerning the rate of contribution to the various funds; electing unilaterally to having this matter determined in its negotiations with Allied, although Independent was not a party to such negotiations (A:202, 211). The Board has held that an employer is relieved of its duty to bargain where a union itself bargains in bad faith. American Cyanamid Co., 129 NLRB 683 (1960); Otto Klein d/b/a Artistic Permanent Wave Co., 172 NLRB No. 223 (1968).

In the latter case, the Board held that the evidence failed to establish that an employer had unlawfully refused to bargain with a union and then unlawfully withdrawn recognition, in view of the fact that the union inter alia, had adopted a "take-it-or-leave-it" attitude on a number of issues and had refused to explore the employer's counter-proposals. In Solar Aircraft Co. 109 NLRB 130 (1954), the Board held that the union's failure to give an employer a formal answer to a proposed plan for recalling strikers, after polling union members on the plan, was grounds for rejecting the contention that the employer

refused to bargain on the subject of the recall of the strikers.

Attention is also called to Thompsons Brothers Coal Company, Inc., 192 NLRB No. 5 (1971), in which implicit in the decision of the Board was the principle that if union negotiators have no authority to agree on the terms of a bargainable matter other than on the basis of a contract or negotiation with a third party, a union refusal to bargain is involved, and the same would constitute a defense to an 8(a) (5) charge. For a decision much in the same vein, see Standard Oil Co. 137 NLRB 690 (1962), in which the Board held that a union unlawfully refused to sign contracts covering the employer's bargaining units, when the delay in signing was unrelated to any dissatisfaction in contract terms, but was based upon the union's decision to approve no agreement with the employer until negotiations were satisfactorily concluded by another local at another of the employer's plants.

In the instant case, Local 455, although meeting with Independent on a limited number of occasions, was not engaged in good faith bargaining. Good faith bargaining presupposes the making of demands, the give and take of negotiations based on the bargaining, the absence of a "take-it-or-leave-it" approach, and an open mind approach. In the instant case, specifics of demands were absent, negotiations were only "surface" in content, and the Independent was faced with a "take-it-or-leave-it" approach with respect to contributions to the six Funds. Independent was given no opportunity to negotiate in this material cost area. Its sole options were to sign a stipulation agreeing to be bound by any contract negotiated by Allied

or to continue on strike. In effect, Independent was denied the opportunity to bargain concerning material aspects of its own contract. Such conduct of Local 455 was violative of the Act. Plasterers & Cement Masons, Local 2, 149 NLRB 1264 (1964).

It should also be remembered that Local 455 has, by its own admission, executed separate collective bargaining agreements with a number of employers whom Independent purported to represent. In addition, it has also been determined administratively that Local 455 agreed to bargain separately with two other employers formerly represented by Independent (North Shore and Charla). It should also be remembered that Local 455's most protracted negotiations have been with Peelle, although it failed to come to terms on a separate agreement with this particular employer member of Independent. This course of conduct on the part of Local 455, first manifesting itself in the secret and separately negotiated agreement with Dextra, is indicative of a clear and predetermined intent and attempt to undermine Independent as the bargaining representative of its employer members. Perhaps the only other interpretation of this course of conduct, is one which postulates that Local 455 was completely indifferent to the multi-employer bargaining and was prepared to waive any rights to continue to insist upon group bargaining. In either event, the lack of a prior multi-employer bargaining history, the individual negotiations and contracts by Local 455 and its disinterest in group bargaining and/or interest in single employer bargaining, combined with its surface

bargaining with Independent, justifies the withdrawals by the various Respondent employers. Neville Foundry Co., Inc. 122 NLRB 1187 (1959); Scougal Rubber Mfg. Co., 126 NLRB No. 53 (1960).

VI

HAVING EFFECTED TIMELY WITHDRAWALS
FROM GROUP BARGAINING, THE RESPONDENT
EMPLOYERS ARE NOT AUTOMATICALLY
SUBJECT TO A BARGAINING ORDER.

Any member of Independent who effectuated a timely withdrawal from multi-employer bargaining, is not automatically subject to an order directing it to bargain with Local 455 on an individual basis. Rather the bargaining rights and obligations of any such withdrawing Respondent employer have to be determined on a single employer basis and on the basis of the facts existing with respect to such individual employer.

In determining whether any or all of the withdrawing Respondent employers violated the Act in entering into collective bargaining agreements with Local 810 (as opposed to bargaining on an individual basis with Local 455), it must first be borne in mind that:

"The Boards attorney has the burden of proof of violations of Section 8 of the National Labor Relations Act * * *". Section 101.10(b),
NLRB Statements of Procedure - Series 8.

The evidence at the hearing indicated that only nine of the Respondent employers, Roman, Greenpoint, Paxton, Melto, Long Island, Mohawk, Master, Koenig and Cervenka (A:1041-1044) signed contracts with Local 810. As to three of these employers, Melto, Mohawk^{7/} and Cervenka, General Counsel offered no evidence as to the circumstances under which the Local 810 contracts were signed and has therefore not met his burden of proof. As to Koenig, General Counsel's one witness testified that the employees, without the involvement of the employer, opted for Local 810 (A:283-285, 289-290). In addition, all Koenig employees signed the Local 810 contract (A:1043), Koenig employees never struck the employer on behalf of Local 455 (A:1339), but did strike the employer on behalf of Local 810 (A:1340 et. seq.). As to Master, only one employee testified and other than stating that he belonged only to Local 455, he did not testify as to the other employees or the circumstances under which Master signed with Local 810. He specifically stated he did not know whether the other eleven employees were still out on strike (A:271). Therefore, General Counsel has not met his burden of proof as to Master. As to Paxton, there is some contradictory testimony as to the actions and sympathies of one employee, but no contradiction of the employer's testimony that a majority of his pre and post strike employees had signed cards for and had joined Local 810;

7/ There is evidence that at least two of the Mohawk employees signed the Agreement with Local 810, in addition to a representative of Mohawk and a representative of Local 810 (A:1043, 1044).

the same culminating in a negotiated contract with Local 810 (A:1386 et. seq.) Only as to Greenpoint and Long Island is there some testimony as to the wishes of the majority of employees. Therefore, and without regard to any other defense, an order directing bargaining with Local 455 would be improper as to at least seven of the employers signing contracts with Local 810. Contrary to the assertion of General Counsel, NLRB v. Sheridan Creations, Inc., (supra) does not hold to the contrary, since it holds only that the multi-employer unit remains the appropriate unit when withdrawal is untimely.

VII

EVEN ASSUMING ARGUENDO THAT NO TIMELY
WITHDRAWAL WAS EFFECTED FROM MULTI-
EMPLOYER BARGAINING, THE STIPULATION
SIGNED BY THE FIVE EMPLOYERS WITH LOCAL 455
IN LATE JANUARY 1976, IS NOT BINDING UPON
INDEPENDENT OR ANY OF THE RESPONDENT EMPLOYERS.

The Administrative Law Judge concluded (and the Board affirmed) that the stipulation signed by the five employers on or about January 23, 1976, is binding upon all other members of the Association. This conclusion is unsupported by any proposition of law, contrary to the facts and constitutes the most flagrant of the errors of the Board and the Administrative Law Judge.

The contention that the contract of the five is binding upon the majority, was first litigated in the Section 10(j) proceeding before Judge Dooling (supra). The Regional Director there argued that the

group as a whole be preliminarily required to execute and abide by the contract of the five. Judge Dooling in denying the request, stated at 95 LRRM 2019:

"The pressing of the forbidden withdrawal premise to support the conclusion that the five Local 455 agreements are the result of a group bargain that must be enforced against all the respondents by preliminary injunction is daring and novel. The Administrative Law Judge may not, perhaps may not lawfully, reach the conclusion that a contract assented to by a minority can be imposed on a dissenting majority. (emphasis supplied)

The Administrative Law Judge has concluded correctly that (i) at no time did any of the five employers state that it had the authority to speak for or bind the entire Independent Association, and this was made clear to Colavito, (ii) Doyle told Colavito that he wanted him to understand that he was signing as a "Member of the Association" only because Colavito insisted upon it and Doyle wanted a contract for his own company so that he could get back into production, (iii) Doyle told Colavito he was not signing for any other employer, (iv) Doyle told Colavito he was not signing for the Independent Association, (v) Doyle told Colavito he was signing only for Brakewell, and (vi) to these latter points Colavito said nothing (ALJ: 51; A:2136). The foregoing is based on the credited testimony of Dan Doyle (ALJ: 51 Fn. 44; A:2136)

The Administrative Law Judge erroneously concludes, however, that "However it is evident that he (Colavito) regarded the contract as the Association contract" (ALJ:51; A:2136). In fact, Colavito did not regard the contract as being binding upon the Independent

Association and its members.^{8/} This Court should bear in mind that Colavito first insisted upon each of the five employers signing "on behalf of the Association", and only when each refused did he relent and insist upon the lesser language. Equally to the point is the testimony of Doyle (credited by the Administrative Law Judge, but unfortunately overlooked by him):

"On Monday we had a meeting and at one point where I or someone in the group said we can't sign for the Association, Bill (Colavito) said, well, it's just a formality, and if you like I can have you talk to our attorneys and she'll explain that this is just a formality, the fact that you are members of the Association, so that you sign for the Association; it really doesn't mean anything." (A:1292)

We start then with a minority group of employers, empowered by Independent and its majority members to bargain only on behalf of that minority. Local 455 is so notified by Independent (R:13) and repeatedly so advised by the minority employers. Local 455 nevertheless attempts to compel these minority employers, to sign a contract identifying themselves as executing that contract on behalf of the group as a whole. The minority employers refuse. Local 455 relents, but requests that when signing, the minority employers identify themselves as "members of the Association" adding that such description "really doesn't mean anything". In fact, Local 455 is correct; the description means little and adds nothing. Certainly nothing in the foregoing could, as a matter of law or fact, constitute the minority as

8/ Nor did Local 455 Business Agent Tessler, who testified that he considered each employer who refused to sign the stipulation agreed to with the five employers as "still on strike" (A:947).

the agent of the majority.

Secondly, the minority, even if it were acting on behalf of the majority in negotiating an agreement, could have authority to negotiate and recommend only, but not to consummate. Spigner testified as follows at A:1883, 1884. (See also GC: 43):

Q. Now, did the negotiating advisory committee -- was this the committee that did the actual negotiations with Local 455?

A. No, no.

Q. Was there a committee that actually negotiated with them?

A. Yes.

The negotiating advisory committee was an advisory committee and from those members constituted the acu (sic.) bargaining group.

Q. I, of course, Mr. Doyle, Mr. Peelle, Mr. Udyess, Mr. Shiner, and Mr. Balfour -- Walter Balfour.

Q. Now, do I understand that this group would report an offer to the negotiating advisory committee?

A. Yes.

Q. And what was the function of the negotiating advisory committee?

A. To formulate policy.

Q. Who had the ultimate say as to whether any particular settlement would be made?

A. The membership.

Q. Could the committee that was negotiating with the union make a final settlement.

A. No.

We could only recommend to the membership that a settlement be made or rejected.

Q. Could the negotiating advisory committee negotiate a final settlement?

A. No.

We could only recommend to the membership that a settlement be made or rejected.

Q. Could the negotiating advisory committee negotiate a final settlement?

A. No.

The only one who could would be the membership as a whole.

Q. I see.

So that no individual and no group had the authority to make a settlement?

A. That's the way our constitution was written.

Under any circumstances, therefore, the vote of the full membership of Independent would have been required to accept a contract negotiated with Local 455. Even assuming arguendo that the vote of the five employers to be deemed a membership vote, the same would not suffice under the aforesaid by-laws since the five would not constitute a quorum (see p. 5 of GC:43). Thus the majority did not have to adopt elaborate measures to avoid a final settlement with Local 455. It had the authority to reject any agreement negotiated by its own negotiating committee (whether that would have been the original and formal committee headed by Spigner or even the group headed by Dovle, if that be considered a committee). Ultimate acceptance or rejection of the package rested with the membership as a whole and not its negotiating committee.^{9/} Note that this procedure in no way materially differed from the internal ratification procedures of Local 455 itself. Whereas the Local 455 negotiating committee headed

9/ Contrary to the Brief submitted by the General Counsel the withdrawing members did not seek to withdraw from Independent and relinquish their membership rights. Rather they sought only to withdraw bargaining authority from Independent (GC:40).

by Colavito originally rejected the final offer of Allied, the membership itself had the final say and voted to accept the final offer (A:218, 221 and 222).

Neither the Administrative Law Judge, the Board, General Counsel or the Charging Party, cites any authority for the proposition that a minority group without either express, implied or apparent authority, in the face of written and oral advance disclaimers of authority, and without conformity to the admitted ratification procedures, can be deemed to be the agent for a majority and bind the majority against the wishes of both the minority and majority. Their rationale is simply that to rule otherwise is (i) to reward the majority employers for their own unfair labor practices, and (ii) place Local 455 in the position of perhaps having to offer better terms to this majority in order to ultimately induce it to sign an agreement. Assuming arguendo the existence of each and every unfair labor practice found by the Board, the first basis nevertheless does not withstand analysis. The majority members of Independent did not have to commit unfair labor practices to avoid settling with Local 455 on the basis of the Allied settlement. They did not have to withdraw from group bargaining nor sign individual contracts with Local 810 to accomplish this result. They simply could have opted to reject the settlement. Presumably the strike would then be continuing today, even the absence of withdrawal, since the basic issue of the differences between the two

association contracts has never been resolved. Thus the absence of a contract between Local 455 and the majority employers is not the result of or reward for unfair labor practices; it is a condition which exists and would have existed in the absence of any unfair labor practices.

The alleged second basis is similarly not supportable as either a matter of law nor fact. While the Act sanctions bargaining orders, it does not authorize administrative settlements. As stated by Peter D. Walther in "The Board's Place at the Bargaining Table", 28 Labor Law Journal 131 (March 1977):

"No matter what happens at or on the way to the bargaining table, the Board cannot go so far as to compel the making of a concession or the agreement to any proposal. Even where, as sometimes happens, the employer engages in patently illegal activity which undermines the union's support and destroys its bargaining strength, the Board must limit itself (perhaps through imposition of a bargaining order) to bringing the parties to the bargaining table; anything beyond this is not permitted."

This has long been the law as enunciated by the United States Supreme Court and the Board, H. K. Porter Company, Inc. v. NLRB, 397 U. S. 99 (1970); NLRB v. Burns International Security Services, Inc., 406 U. S. 272 (1972); Consumers Research Inc., 2 NLRB 57 (1936).

The Board has exceeded its authority by attempting to impose a substantive settlement upon the Respondents. It would do so to avoid (as stated by the Administrative Law Judge) placing Local 455 in the

"awkward" position of perhaps having to offer the majority more favorable contract terms than offered to the minority -- in order to induce the recalcitrant majority to finally settle. Assuming such to be the case, it is a matter that goes to the substance of the bargaining; indeed to the heart of the process itself. The pressures that either side may bring to the bargaining table to achieve a settlement more favorable to it, are not to be eliminated or even diluted by the unlawful imposition by the Board of settlement terms. Additionally, it is important to point out that non-uniform settlements by Local 455 were the rule and not the exception during the strike. The settlements reached by Local 455 with non-affiliated companies in the summer of 1975, provided for far greater wage increases to the employees than the settlements subsequently negotiated with Allied or the five minority members of Independent (A:346;GC:42). Initially, the ability of Allied and the minority five employers to more readily accept the consequences of a long strike, than the non-affiliated companies, accounted for their ability to ultimately obtain more favorable wage settlements than the non-affiliated companies. Ultimately, however, the desire of Mr. Doyle and the four other minority employers to end the strike so as to be able to get their companies back in operation, became analogous to the position of the non-affiliated companies in the summer of 1975; the ability of the majority members of Independent to continue to "hold out" was to the position of the minority five employers, as was the position of Allied to the settling non-affiliated companies in 1975. Would the Board

consider it legally significant that the members of Allied, having achieved a more favorable wage settlement than the non-affiliated companies, similarly placed Local 455 in an "awkward position"? If it be argued that the Board was only concerned with non-uniform settlements within a group participating in multi-employer bargaining (because of the possible effects non-uniform settlements might have on such bargaining), how would it account for the differing settlements within the group of five itself, or more importantly, the willingness of Local 455 to negotiate vastly different terms with Peelle. Under any circumstances, however, it is not within the province of the Board to mandate settlements so as to facilitate multi-employer bargaining (or any other form of bargaining, for that matter).

Therefore, and assuming *arguendo* that all the findings of unfair labor practices are affirmed (including those relating to unlawful withdrawal from group bargaining and unlawful entries into collective bargaining agreements with Local 810), the maximum allowable remedial order is a bargaining order. It is not a direction that the remaining members of Independent execute and be bound by the terms of the January 23, 1976 stipulation.

VIII

ASSUMING ARGUENDO THAT LOCAL 455 WOULD OTHERWISE BE ENTITLED TO A REMEDIAL ORDER, THE SAME SHOULD HAVE BEEN DENIED IN THE INSTANT CASE BECAUSE OF THE VIOLATIVE ACTS OF LOCAL 455.

Laura Modes Co., 144 NLRB 1952 (1963) supra,
held that a union otherwise entitled to relief as a result of employer violations of the Act, would be denied the right to invoke the Board's statutory processes in aid of a demand for recognition as a bargaining representative unless and until it demonstrated a majority position in a Board election, where it had engaged in violence evidencing a disinterest in enforcing its representation rights through peaceful legal processes provided by the Act, See also Artcraft Mantel and Fireplace Company, 174 NLRB No. 110 (1969).

The Board extended the Laura Modes doctrine in Allou Distributors, Inc., 201 NLRB 47 (1973) to deny to a union otherwise available relief against employer violative acts, where the union had intimidated and coerced employees in regard to a decertification petition, even though the union had been the employees bargaining agent for many years. In so doing, the Board made it clear that the Laura Modes doctrine would apply, whether the intimidation and coercion had been directed against the employer or employees, whether an incumbent or insurgent union was involved, and whether the union had been the bargaining representative for a long or short period.

The most recent extension of the Laura Modes doctrine occurred in Union Nacional DeTrabajordes, 219 NLRB No. 157 (1975). In that case, the Board not only denied to the union otherwise available relief, but also revoked the union's certification as bargaining representative of the employer's employees. This was done on the basis of

acts of physical violence and threats of physical harm upon supervisors and employees.

Notwithstanding the conclusion of the Administrative Law Judge (affirmed by the Board) that Local 455 violated Section 8(b)(1)(A) of the Act, he concluded that the misconduct of Local 455 did not constitute evidence of a deliberate plan or policy on its part to obtain adherence to its aims by intimidation or violence. The Record indicates that the actual pattern of intimidation and violence was far more pervasive than concluded by the Administrative Law Judge, (Koenig, A:1154 et. seq., A:1187 et. seq; Long Island Steel, A:1191 et. seq., A:1208 et. seq; Greenpoint, A:1119 et. seq., A:1481-1483; Paxton, A:1359-1371; Mohawk, A:1431-1438; Trojan, A:1496 -1539, A:1570-1580; S. Cervenka, A:1117-1123). Moreover, it is difficult to understand the conclusion that there was no "deliberate plan or policy" when the wrongdoers included business agents Mannsman, Matienzo, Steinhauser, Schiffano and Buffalino, as well as the ever present Mr. Bell. Nor is the fact that the strike was lengthy, or that the Board concluded that the Respondent employers had committed unfair labor practices, or that a majority (though by no means all) of Local 455's members did not overtly manifest an intention to desert its ranks, an excuse for the conduct of Local 455.

It should also be remembered that while the threats and violence may not have been directed against all members of Independent, certainly action directed against any one or more members of Independent

would tend to have the same coercive effect as if directed against the group as a whole. Thus the repeated threats and violence at Trojan, committed before any Respondent employer either withdrew from multi-employer bargaining or signed with Local 810, most certainly was coercive in design and effect; and presumably aimed against both employer and employee. Accordingly, and even if some or all of the unfair labor practice allegations against the Respondent-employers are sustained, the otherwise available relief should have been denied on the basis of the Laura Modes doctrine. In failing to do so, the Board erroneously disregarded its previously established body of law.

IX

NO EMPLOYEE OF ANY RESPONDENT EMPLOYER IS ENTITLED TO REINSTATEMENT

The Administrative Law Judge concluded (and the Board affirmed) that Respondent, Long Island, wrongfully discharged striking employee Michael Frenna. The complaint alleged that Frenna had been wrongfully discharged on January 6, 1976. Sole support for this allegation appears at A:749 where Frenna testified that Davidson told him " * * * you better look for another job". If, in fact, Davidson's words constituted a discharge at that point in time, there would, of course, have been no reason for Davidson telling Frenna on January 16, 1976, " * * * look for another job", (A:752). It should

be borne in mind that Frenna had been on strike for over six months in January of 1976, and according to Frenna, Davidson was saying "* * * that he was going to close up (A:750) and "* * * I'll liquidate first" (A:752). Regardless of whether such words, if spoken, were lawful under the Act, the logical interpretation of Davidson's words was not an on-the-spot discharge of Frenna, but rather a statement that Frenna would probably never again work at Long Island, and had better look for another job. In January, all comments as to the likelihood of Frenna coming back to work for Long Island, could only be classified as predictions. Frenna was not then working, was not prepared to come back to work absent a settlement with Local 455, and his status the day after the remark by Davidson was precisely the same as it was the day before.

The Administrative Law Judge similarly concluded (and the Board affirmed) that Respondent Greenpoint wrongfully discharged three striking employees. The complaint alleged wrongful discharges on November 10, 1975. In fact, Greenpoint had requested in writing that its employees return to work on November 10th and advised that if they did not, their positions may be filled with other personnel (R:22). Regardless of any subsequent reinstatement rights, there is no question but that an employer can hire replacements for economic strikers. On the date the letter was sent and on November 10th, the workers of Greenpoint were engaged in an economic strike and could lawfully be replaced by the employer. All that was stated in the letter was that Greenpoint might hire replacements for the economic

strikers if such strikers did not return on November 10th. Such letter bears not even a taint of illegality. It is also important to note, that even assuming arguendo the existence^{of} wrongful discharges in both cases, reinstatement is conditioned upon the unconditional willingness to return to work. All of these employees were on strike prior to the alleged discharges and continued on strike thereafter. An unconditional offer to return was a condition precedent to return, and as will be discussed, none was ever made.

Lastly, the Administrative Law Judge concluded (and the Board affirmed) that the striking employees of other Respondent-employers were entitled to reinstatement as unfair labor practice strikers who unconditionally offered to return to work. The contention fails in two regards. In the first instance, there is no dispute that the strike initially was economic in nature; resulting from the failure to agree upon a contract (A:2061). Assuming arguendo the existence of unfair labor practices committed by Respondent employers during the strike, such occurrences do not automatically convert the strike into an unfair labor practice strike. In order to do so there must be proof of the causal relationship between such unfair labor practices and the prolongation of the strike. In fact, the character, status and motivation of the strike remained the same in mid-January 1976, as it had been on July 1, 1975. No employee was striking because of any alleged wrongful withdrawal from multi-employer bargaining. The strike continued unabated because of the failure of the parties to reach an economic settlement.

The conclusion of the Administrative Law Judge fails for another reason. Assuming arguendo, the strike had been converted into an unfair labor practice strike in January 1976, nevertheless, and as conceded by General Counsel in its brief to this Court, reinstatement would be conditioned upon an unconditional offer to return to work. There never was such an unconditional offer. Local 455 was willing to permit its members to return to work, and the members would have returned, only on a conditional basis, i. e., the acceptance by the remaining Respondent employers of the stipulation signed by the five employers in late January 1976 (A:947, 965 and 966). Mr. Matienzo, a representative of Local 455, put it quite succinctly at A:965 and 966:

- Q. Now, you asked Mr. Bronston whether he would put the people back to work?
- A. Yes.
- Q. Did you tell him under what terms?
- A. The terms of the stipulation. If he would sign the stipulation, put the men back to work.
- Q. In other words, the men would go back to work only if he signed the stipulation; is that correct?
- A. As I recall he had to sign something, just not going to send them back, you know, without signing something.
Yes, of course he would sign the stipulation.
- Q. In other words, the men were not prepared to go back to work unless he signed some sort of contract with 455?
- A. Correct, they are still on strike.
- Q. What contract was it you insisted he sign or you asked him to sign with 455?
- A. Stipulation that the five members had signed.

The conclusion of the Administrative Law Judge can be considered correct only if it be determined that the Respondent employers were bound by the terms of the stipulation negotiated with the five employers in late January 1976. Only then could the offer to return be deemed unconditional. Absent the same, however, the strike continued on as essentially one economic in nature, and the offer to return was conditioned upon an economic settlement and entry into a contract not binding upon nor acceptable to the Respondent employers.

CONCLUSION

For the foregoing reasons, this Court should deny enforcement of the order of the Board.


Stanley Israel
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Bluestone, Kliegman & Israel,
Attorneys for Respondents, with
the exception of:
Heuser Iron Works Inc.
Spigner & Sons Structural Steel Co. Inc.
Shopmen's Local Union #455, International
Association of Bridge, Structural and
Ornamental Iron Workers, AFL-CIO

United States Court of Appeals
for the Second Circuit

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

National Labor Relations Board
Petitioner
and
Shopmen's Legal Union Et al.
Intervenor
against
Independent Association of Steel Fabricators Inc.,
et al.
Respondents

State of New York, County of New York, ss.:

Raymond J. Braddick
agent for Stanl. Bel Esq., being duly sworn deposes and says that he is
the attorney
for the above named ident herein. That he is over
21 years of age, is not a party to the action and resides at 11 Park Place New York

That on the 20th day of March, 19 78 he served the within
Brief

upon the attorneys for the parties and at the addresses as specified below

1. Sipser Weinstock Harper & Dorn Esqs.
380 Madison Avenue New York, New York
2. Mirkin Barre Saltzstein & Gordon Esqs.
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National Labor Relations Board Washington D.C.

by depositing 3 true copies to each
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly main-
tained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned,
that being the addresses within the state designated by them for that purpose, or the places
where they then kept offices between which places there then was and now is a regular com-
munication by mail.

Sworn to before me, this 20th.

day of March, 1978

ROBERT W. JOHNSON,
Notary Public, State of New York
No. 4509705

Qualified in Delaware County
Commission Expires March 30, 1977